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S.J., Appellant)	
)	
and)	Docket No. 19-1864
)	Issued: August 12, 2020
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Birmingham, AL, Employer)	
)	

Case Submitted on the Record

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

² Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated August 7, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-1864 (issued August 7, 2020).

This case has previously been on appeal before the Board.³ The relevant facts are set forth below.

On February 3, 2014 appellant, then a 46-year-old food service worker, filed a traumatic injury claim (Form CA-1) alleging that she injured her right knee and lower back on January 24, 2014 when her left foot got caught on a drawer of her desk as she turned in her chair to get up causing her to fall while in the performance of duty. On April 29, 2014 OWCP accepted the claim for contusion of the right knee and sprain of the back, lumbar region.

In a letter dated January 8, 2015, the employing establishment noted that appellant was to resume regular-duty work as of January 12, 2015, as there was no medical evidence providing work restrictions.

On January 23, 2015 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits as the weight of the medical evidence established that she no longer had residuals or disability due to the accepted January 24, 2014 employment injury.

By decision dated March 13, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date.

On March 30, 2015 appellant requested a telephonic hearing, which was held before an OWCP hearing representative on November 18, 2015.

By decision dated January 28, 2016, OWCP's hearing representative affirmed the March 13, 2015 decision.

On February 16, 2017 appellant, through counsel, requested reconsideration.

By decision dated February 27, 2017, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

On August 24, 2017 appellant, through counsel, filed a timely appeal before the Board. By decision dated December 19, 2018, the Board found that OWCP properly denied appellant's request for reconsideration of the merits of her claim finding that it was untimely filed and failed to demonstrate clear evidence of error.⁴

On June 28, 2019 appellant, through counsel, requested reconsideration. Counsel argued that appellant filed a timely reconsideration request, noting that a receipt reflected that the request was received on February 2, 2017 and the recorded document was received on February 16, 2017. Counsel noted that the certified mail receipt reflected that a package was delivered. Counsel further argued that the package included medical evidence from Dr. Kathleen Warner, an internist, which was not considered and that this was clear error. Counsel noted that the additional medical evidence challenged the findings of Dr. Todd Smith, Board-certified orthopedic surgeon, and that

³ Docket No. 17-1835 (issued December 19, 2018).

⁴ *Id.*

OWCP's failure to consider the medical evidence from Dr. Warner was clear evidence of error in the issuance of the January 28, 2016 decision.

By decision dated July 24, 2019, OWCP denied appellant's June 21, 2019 request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a). It found that her reconsideration request neither raised substantive legal questions nor included new and relevant evidence.

The Board notes that the most recent decision reviewing the merits of appellant's case was OWCP's January 28, 2016 decision. Appellant had one calendar year from the date of that decision, until January 27, 2017, to ensure receipt by OWCP of a reconsideration request.⁵ OWCP received her reconsideration request on June 28, 2019. As the received date was more than one year after the January 28, 2016 OWCP decision, the Board finds that appellant's request must be considered untimely.

The proper standard of review for an untimely reconsideration request is the clear evidence of error standard.⁶ In denying appellant's reconsideration request in its July 24, 2019 nonmerit decision OWCP applied the incorrect standard of review. Therefore, the Board will set aside OWCP's July 24, 2019 decision and remand the case for proper review under the clear evidence of error standard.⁷

⁵ The Board notes that although counsel asserts that OWCP received the reconsideration request on February 2, 2017 that received date would still be considered untimely.

⁶ See 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ Due to the appearance that appellant's reconsideration request and/or supportive documentation was received into an incorrect file number, upon return of the case file OWCP shall properly assemble and reconstruct the case files to ensure that documents submitted in relation to the present file are contained in the proper claim file prior to issuance of a new decision. OWCP shall also consider whether his claim files should be administratively combined.

IT IS HEREBY ORDERED THAT the July 24, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: August 12, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board